

# **PRESERVING AN ENTREPRENEURIAL AMERICA: HOW RESTRICTIVE IMMIGRATION POLICIES STIFLE THE CREATION AND GROWTH OF STARTUPS AND SMALL BUSINESSES**

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## **I. INTRODUCTION**

*"Immigration is the story of American history."*<sup>1</sup>

*"Entrepreneurship is as much a part of the American experience as baseball, jazz and Disneyland."*<sup>2</sup>

America has always been a land of immigrants. Likewise, America has always been a nation of entrepreneurs. The immigrant entrepreneurial spirit is an essential part of this nation's identity. From its inception, America has attracted entrepreneurial individuals—men and women who left their birthplaces and all they ever knew to pursue the "American Dream." Today, the immigrant entrepreneur remains relevant and is key to the American economy. Immigrant entrepreneurs are starting new businesses, creating jobs and driving economic growth. Many of America's most iconic companies, such as AT&T, Kraft, Proctor & Gamble, Goldman Sachs, Kohl's, Nordstrom and Capital One were started by immigrant entrepreneurs.<sup>3</sup>

However, despite the tangible benefits the American economy has realized as a result of the entrepreneurship and innovation of immigrants,<sup>4</sup> U.S. immigration laws remain unwelcoming to immigrant entrepreneurs. Restrictive immigration policies are turning away many current and future

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<sup>1</sup> Statement made by Senator Edward M. Kennedy on the Senate Floor on April 3, 2006. Robert Gittelsohn, *Remembering Ted Kennedy: The Inspirational Champion of Immigration Reform* (Aug. 26, 2009), <http://smallbusiness.foxbusiness.com/entrepreneurs/2012/10/04/small-business-big-topic-during-presidential-debate/>.

<sup>2</sup> PAUL D. REYNOLDS ET AL., EWING MARION KAUFFMAN FOUND., THE ENTREPRENEUR NEXT DOOR: CHARACTERISTICS OF INDIVIDUALS STARTING COMPANIES IN AMERICA 28 (2002).

<sup>3</sup> THE P'SHIP FOR A NEW AM. ECON., THE "NEW AMERICAN" FORTUNE 500 1, 6 (2011) [hereinafter NEW AMERICAN FORTUNE 500].

<sup>4</sup> For the sake of simplicity, this note will refer to all noncitizens as immigrants.

innovative entrepreneurs and inhibiting the creation of new business essential for economic growth.

This note will analyze the effect of our restrictive immigration policies on the creation and growth of startups and small businesses. While there is no doubt that our current immigration system is in need of comprehensive reform, this note will not address the wider immigration debate. Rather, this note will focus on the shortcomings of our immigration policies that stifle the creation and growth of startups and small businesses. Part II of this note will discuss the importance of startups and small businesses to the American economy. Part III will focus on the significant contributions of immigrant entrepreneurs to the creation and growth of startups and small businesses. Part IV will address the specific pitfalls of our current immigration policies that harm immigrant entrepreneurship and stifle new business creation and economic growth. Part V will propose reforms to our restrictive immigration policies that will allow America to better capitalize on the valuable contributions of immigrant entrepreneurs.

## II. THE IMPORTANCE OF STARTUPS AND SMALL BUSINESSES

New businesses and the entrepreneurs that create them are “engines of job creation” for the American economy.<sup>5</sup> Startups and young businesses—those less than five years old—are crucial to job creation in America. Since 1980, businesses that are less than five years old have accounted for a vast majority of the net job creation in the American economy.<sup>6</sup> Today, startups and young businesses “create an average of three million new jobs in their first year”<sup>7</sup> and “account for nearly all net job creation in the United States.”<sup>8</sup>

Small businesses are also crucial to job creation and contribute significantly to the American economy. Small businesses represent the majority of businesses in the United States<sup>9</sup> and employ half of the U.S. private sector workforce.<sup>10</sup> Small businesses also generate two out of every

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<sup>5</sup> DANE STANGER & ROBERT E. LITAN, EWING MARION KAUFFMAN FOUND., *WHERE WILL THE JOBS COME FROM* 2 (2009).

<sup>6</sup> *Id.*

<sup>7</sup> ROBERT W. FAIRLIE, P'SHIP FOR A NEW AM. ECON., *OPEN FOR BUSINESS: HOW IMMIGRANTS ARE DRIVING SMALL BUSINESS CREATION IN THE UNITED STATES* 6 (2012).

<sup>8</sup> DANE STANGLER & PAUL KEDROSKY, EWING MARION KAUFFMAN FOUND., *NEUTRALISM AND ENTREPRENEURSHIP: THE STRUCTURAL DYNAMICS OF STARTUPS, YOUNG FIRMS, AND JOB CREATION* 2 (2010).

<sup>9</sup> OFFICE OF ADVOCACY, SMALL BUS. ADMIN., *ANNUAL REPORT ON SMALL BUSINESS AND COMPETITION* 17 (2001).

<sup>10</sup> NAT'L ECON. COUNCIL, *MOVING AMERICA'S SMALL BUSINESSES & ENTREPRENEURS FORWARD* ii (2012).

three new jobs in the U.S. economy.<sup>11</sup> Today, approximately sixty million Americans are employed by small businesses.<sup>12</sup>

Furthermore, the creation of new business is a “fundamental indicator of entrepreneurial activity” in the American economy and is “highly associated with economic growth.”<sup>13</sup> Innovation—“the development of new products, services and the know-how that leads to greater output”—is often thought of as the central catalyst of economic growth.<sup>14</sup> In the United States, entrepreneurs who launch new ventures are responsible for a large share of the innovation that takes places.<sup>15</sup> Studies reveal that the source of innovation in most American industries comes from new business.<sup>16</sup> After documenting the “entrepreneurial beginnings” of 197 of the corporations on the Fortune 200 list, the National Commission on Entrepreneurship found that “the formation of new industries and the development of most new technologies [was] highly dependent on the creation of new firms.”<sup>17</sup>

### III. THE CASE FOR IMMIGRANT ENTREPRENEURS

Immigrant entrepreneurs start new businesses, create jobs and drive economic growth. Despite the importance of startups and small businesses with regard to job creation and economic growth,<sup>18</sup> the nation’s new business startup rate is declining and in 2010 it reached an all-time low.<sup>19</sup> Fortunately, immigrant entrepreneurs are filling the gap and helping fuel the entrepreneurship and innovation that are essential to the American economy. Since 1996, “the business startup rate of immigrants has increased by more than 50 percent . . . while the business startup rate of the native-born has decreased by 10 percent over the same time period.”<sup>20</sup>

Today, an immigrant is “more than twice as likely to start a business” than a native-born American.<sup>21</sup> Additionally, “[i]mmigrants start companies

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> REYNOLDS ET AL., *supra* note 2, at 6.

<sup>14</sup> EWING MARION KAUFFMAN FOUND., ON THE ROAD TO AN ENTREPRENEURIAL ECONOMY: A RESEARCH AND POLICY GUIDE 21 (2007) [hereinafter ROAD TO AN ENTREPRENEURIAL ECONOMY].

<sup>15</sup> *Id.*

<sup>16</sup> See REYNOLDS ET AL., *supra* note 2, at 6.

<sup>17</sup> *Id.*

<sup>18</sup> See NAT’L ECON. COUNCIL, *supra* note 10, at ii (highlighting the Obama administration’s investments and efforts to support small businesses and American entrepreneurs).

<sup>19</sup> FAIRLIE, *supra* note 7, at 2.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.*

at twice their ratio in the U.S. population, twice their share of the U.S. workforce, and more than two and half times their share of the overall population.”<sup>22</sup> Some commentators have even noted that these ratios may actually underestimate the entrepreneurial activity of immigrants because of the “lag effect.”<sup>23</sup> Furthermore, immigrant entrepreneurs are responsible for 30% of the small business growth over the past two decades.<sup>24</sup> In fact, in 2011 alone, immigrants started 28% of all new small businesses, despite accounting for only 12.9% of the U.S. population.<sup>25</sup> Today, immigrants represent 18% of all small business owners in the United States.<sup>26</sup>

Immigrant-owned companies also employ millions of American workers. According to a report published by the Partnership for a New American Economy, immigrant-owned companies now employ 10% of all individuals working for privately-owned U.S. companies and pay more than \$125 billion in employee salaries every year.<sup>27</sup> Furthermore, immigrant-owned companies generate substantial income for businesses and revenue for the American economy, in addition to employing millions of American workers. In 2010 alone, immigrant-owned companies generated over \$779 billion in sales, \$109 billion in income and accounted for more than 15% of the national business income generated during the year.<sup>28</sup>

Immigrant entrepreneurs also support many different sectors of the American economy and play an important role in driving U.S. exports. First, immigrants founded more than 25% of all new companies “[i]n seven of the eight industries that the U.S. Bureau of Labor Statistics estimates will grow [the] fastest this decade.”<sup>29</sup> Second, immigrant-owned companies

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<sup>22</sup> Peter H. Schuck & John E. Tyler, *Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 FORDHAM URB. L.J. 327, 333–34 (2010).

<sup>23</sup> *Id.* at 334 (“It would be unusual for immigrants to found their companies in the year in which they arrive in the United States particularly because most immigrants come here to study or work, rather than to start companies. Further, it generally takes time for the ideas, networks, and other entrepreneurial factors to coalesce and motivate visa holders to start a company.”).

<sup>24</sup> FISCAL POLICY INST., IMMIGRANT SMALL BUSINESS OWNERS 2 (2012).

<sup>25</sup> FAIRLIE, *supra* note 7, at 8.

<sup>26</sup> IMMIGRANT SMALL BUSINESS OWNERS, *supra* note 23, at 1.

<sup>27</sup> FAIRLIE, *supra* note 7, at 14.

<sup>28</sup> *Id.* at 12–13. It is worth noting that in 2000, immigrant-owned companies only generated \$67 billion in business income. *Id.* at 13. This \$42 billion difference represents the fact that immigrant-owned companies increased their business income by more than 60% from 2000 until 2010. *Id.*

<sup>29</sup> *Id.* at 16 (“[I]mmigrants founded 28.7 percent of health care and social assistance companies, 25.4 percent of professional and business services, 31.8 percent of construction firms, 29.1 percent of retail trade companies, 23.9 percent of leisure and hospitality companies, 28.7 percent of educational services, 28.2 percent of ‘other services,’ and 29.4 percent of transportation and utilities firms.” (footnotes omitted)).

account for over 20% of the total income generated in a number of different industries such as transportation, retail and recreation and entertainment.<sup>30</sup> Finally, immigrant-owned businesses are not only “60 percent more likely to export than non-immigrant owned businesses,” but they are also more than twice as likely to export in high volume.<sup>31</sup>

Immigrants are also much more likely to pursue the courses of study that are key to innovation and economic growth. Researchers consider education in a science, technology, engineering or mathematics (STEM) field as an indicator of innovation and have found “a correlation between advanced education in a STEM field and high rates of entrepreneurship and innovation.”<sup>32</sup> Based on statistics collected by the National Science Foundation, researchers at Duke University and the University of California at Berkley found that immigrant students “received nearly 60 percent of all engineering doctorates,” and “over 50 percent of all doctorates in engineering, mathematics, computer sciences, physics, and economics” awarded by U.S. universities.<sup>33</sup>

Researchers also consider patenting activity as another indicator of innovation.<sup>34</sup> Recent studies reveal “high rates of patenting activity by foreign-born inventors relative to their presence in the population as a whole.”<sup>35</sup> First, researchers have found that immigrant scientists and engineers received approximately 20% more patents than their native-born counterparts.<sup>36</sup> Second, “immigrants with bachelor’s degrees were granted patents at twice the rate of native-born Americans with bachelor’s degrees.”<sup>37</sup> Third, immigrants with graduate degrees received patents at approximately “three times the rate” of native-born Americans with graduate degrees.<sup>38</sup> Finally, researchers have found that a “10 percent increase in the number of foreign graduate students would raise patent

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 10. This is important because when U.S. exports increase, economic output and job creation also increase. *Id.* Likewise, when U.S. exports decrease, the U.S. economy tends to shrink and there are less available jobs. *Id.*

<sup>32</sup> Schuck & Tyler, *supra* note 22, at 330 (internal quotations omitted).

<sup>33</sup> VIVEK WADHA ET AL., EWING MARION KAUFFMAN FOUND., AMERICA’S NEW IMMIGRANT ENTREPRENEURS, PART V, 1 (2007).

<sup>34</sup> Schuck & Tyler, *supra* note 22, at 330.

<sup>35</sup> *Id.* at 330–31.

<sup>36</sup> *Id.* at 331.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

applications by 4.7 percent, university patent grants by 5.3 percent and non-university patent grants by 6.7 percent.”<sup>39</sup>

More importantly, however, immigrants have been successful in translating patents and STEM degrees into tangible benefits for the American economy. A recent study by McGill University and the National Bureau of Economic Research found that immigrant college graduates commercialized their patents at a higher rate than native-born college graduates.<sup>40</sup> Additionally, the study reported that immigrants possess a “niche in start-ups based on technical knowledge from master’s and doctoral degrees” and are thus more likely to start companies with more than ten workers.<sup>41</sup>

Furthermore, immigrants “play an important role in U.S. high-tech entrepreneurship.”<sup>42</sup> A 2005 study by the National Venture Capital Association found that 40% of all “U.S. publicly traded venture-backed companies operating in high-technology manufacturing” were founded by immigrants.<sup>43</sup> In a 2007 study, researchers at Duke University and the University of California at Berkley found that one-quarter of all engineering and technology firms started in the United States from 1995 to 2005 were founded by immigrants.<sup>44</sup> The 2007 study also analyzed all the engineering and technology companies founded during the same time period in Silicon Valley and found that over half of these companies were founded by immigrants.<sup>45</sup> Finally, the 2007 study found that in 2005 alone, the

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<sup>39</sup> Chellaraj et al., *The Contribution of Skilled Immigration and International Graduate Students to U.S. Innovation* ii (World Bank, Working Paper No. 3588, 2005).

<sup>40</sup> MATTHEW DENHART, GEORGE W. BUSH INST., *GROWTH AND IMMIGRATION: A HANDBOOK OF VITAL IMMIGRATION AND ECONOMIC STATISTICS* 54 (2012) (citing on Jennifer Hunt, *Which Immigrants Are Most Innovative and Entrepreneurial? Distinctions by Entry Visa*, 29 J. LAB. & ECON. 417 (2011)).

<sup>41</sup> Jennifer Hunt, *Which Immigrants Are Most Innovative and Entrepreneurial? Distinctions by Entry Visa*, 29 J. LAB. & ECON. 417, 422 (2011).

<sup>42</sup> See DAVID M. HART ET AL., SMALL BUS. ADMIN., *HIGH-TECH IMMIGRANT ENTREPRENEURSHIP IN THE UNITED STATES* 7 (2009). A high level of entrepreneurship in the high-tech sector is important because the “new products, services, and business models that the high-tech sector generates” differentiate U.S. output from that of other countries and “enable capital accumulation, wage gains, and productivity growth.” *Id.*

<sup>43</sup> STUART ANDERSON & MICHAELA PLATZER, NAT’L VENTURE CAPITAL ASS’N, *AMERICAN MADE: THE IMPACT OF IMMIGRANT ENTREPRENEURS AND PROFESSIONALS ON U.S. COMPETITIVENESS* 6 (2005).

<sup>44</sup> WADHA ET AL., *supra* note 33, at 4.

<sup>45</sup> *Id.* at 5. The researchers conducted a special analysis of the engineering and technology companies founded in Silicon Valley to better understand the role regional technology centers play in fueling the growth of these companies. *Id.*

engineering and technology companies founded by immigrants “produced \$52 billion in sales and employed 450,000 workers” across the country.<sup>46</sup>

#### IV. RESTRICTIVE IMMIGRATION POLICIES

Even though immigrant entrepreneurs are starting new businesses, creating jobs and driving economic growth, America’s immigration policies make it difficult for immigrant entrepreneurs who want to start companies to enter and remain in the country. Restrictive immigration policies are turning away current and future entrepreneurs, and thus, inhibiting innovation and the creation of new business essential for economic growth. Furthermore, these restrictive immigration policies are making it increasingly difficult for startups and small businesses in America to hire the foreign talent they often need. Before addressing the specific pitfalls of our current immigration policies that most hurt immigrant entrepreneurship and innovation, a brief overview of our current immigration system may be helpful.

The U.S. immigration system divides all foreign nationals into two groups: individuals seeking to obtain permanent residence and individuals seeking temporary admission for a specific purpose.<sup>47</sup> There are three principal categories for permanent admission: family-sponsored, employment-based and diversity immigration.<sup>48</sup> For temporary admissions, there exists a broad range of categories including tourists, business visitors, students and temporary workers.<sup>49</sup> In order to qualify for admission, immigrants must prove that they “affirmatively fit within one of the various admission categories.”<sup>50</sup>

##### *A. The Need for an Immigrant Entrepreneur Visa*

The current immigration laws do not provide a defined track for immigrants that want to create entrepreneurial ventures in the United States—there is no genuine immigrant entrepreneur visa. Instead, the “immigrant entrepreneur must untangle a hodgepodge of visa categories and regulations in order to lawfully finance and evolve an idea into a

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<sup>46</sup> *Id.* at 4.

<sup>47</sup> U.S. immigration laws refer to individuals that fall into the first group as immigrants and those that fall into the second group as non-immigrants. For the purposes of this note, however, all noncitizens will be referred to as immigrants.

<sup>48</sup> STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 7 (5th ed. 2009).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 251.

growing or established company.”<sup>51</sup> While the U.S. immigration system has no genuine entrepreneur visa, countries like Chile, Canada and the United Kingdom all have launched ambitious programs targeting entrepreneurs.<sup>52</sup>

The lack of a genuine entrepreneur visa is driving away many current and future immigrant entrepreneurs as they turn to more welcoming environments. A prime example follows: in 2010, Claudio Carnino, a foreign-born entrepreneur from Italy made it to the final round interview for a prestigious startup incubator in Providence, Rhode Island.<sup>53</sup> However, in the absence of a genuine entrepreneur visa, the incubator would not risk investing in a company such as Carnino’s, whose founders could not secure permanent visas.<sup>54</sup> While Carnino was unable to launch his startup in America, in 2011, his company was selected for Start-Up Chile, a program that provides promising startups \$40,000 in capital, free office space and a visa that allows immigrant entrepreneurs to start the business in Chile and remain there legally.<sup>55</sup>

When immigrant entrepreneurs such as Claudio launch their entrepreneurial ventures elsewhere, America misses out on potential innovation, job creation and economic growth. While the U.S. immigration system does not provide for a genuine entrepreneur visa, there are two visa categories that were originally intended to attract foreign entrepreneurship and investment: the EB-5 and the E-2. This note will next perform a survey of the EB-5 and E-2 visa categories and describe the limitations of each.

### 1. EB-5 Visa

The EB-5 visa is an employment-based visa that allows for permanent residence. In order to qualify for the EB-5 visa, an immigrant entrepreneur must meet the following requirements: (1) invest at least \$1 million in a new commercial enterprise;<sup>56</sup> (2) benefit the U.S. economy; and (3) create full-time employment for at least ten qualified employees.<sup>57</sup> A qualifying applicant will receive conditional lawful permanent residence status for two

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<sup>51</sup> Alan Tafapolsky, *Foreign Entrepreneurs and Immigration: Founding and Funding a Business in the United States—What Are Your Options? How Ownership Interests Affect Business Immigration Benefits Part I*, 03-6 IMMIGR. BRIEFINGS 1, 2 (2003).

<sup>52</sup> THE P’SHP FOR A NEW AM. ECON., NOT COMING TO AMERICA: WHY THE U.S. IS FALLING BEHIND IN THE GLOBAL RACE FOR TALENT 24 (2012) [hereinafter NOT COMING TO AMERICA].

<sup>53</sup> *Id.* at 22.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> There are some instances that allow for a \$500,000 investment. See 8 U.S.C. § 1153(b)(5)(C)(ii) (2006).

<sup>57</sup> 8 U.S.C. § 1153(b)(5).



years; in the 90 days preceding the end of this period, a qualified applicant must demonstrate that the business was “established and sustained” and that ten American workers are employed.<sup>58</sup>

The EB-5 is more of an “investor” visa and is not suitable for startups. First, the large amounts of capital required for the EB-5 are not in accord with the reality of startups and new businesses. Fewer than 2% of all new businesses start with \$1,000,000 or more in startup capital.<sup>59</sup> In fact, almost 60% of new businesses are founded with less than \$5000 in startup capital.<sup>60</sup> Furthermore, personal and family savings are “the most common source of startup capital” for immigrant entrepreneurs.<sup>61</sup> As the statistics reveal, it is highly unlikely that immigrant entrepreneurs are able to meet the high capital requirements for an EB-5 visa from these sources.

Second, qualifying an individual for an EB-5 is considered “one of the most complicated subspecialties in immigration law” and requires a “sophisticated knowledge of corporate, tax, investment and immigration law.”<sup>62</sup> Furthermore, the statute is not clear on the type of investments and ventures that would “benefit the U.S. economy.”<sup>63</sup> As a result, United States Citizenship and Immigration Services (USCIS) adjudicators are “left to their subjective interpretations of the investment and its relative benefits when reviewing the petition.”<sup>64</sup>

As a result of the difficulties in obtaining EB-5 status, the EB-5 has not been widely used and has probably not resulted in significant job creation. While the immigration laws allow for the issuance of 10,000 EB-5 visas per year, the number of visas issued has never approached the maximum.<sup>65</sup> Furthermore, from its inception in 1990 through the 2008 fiscal year, EB-5 admissions ranged from 59 to 1360.<sup>66</sup> However, because these figures

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<sup>58</sup> 8 U.S.C. § 1186b.

<sup>59</sup> ROBERT W. FAIRLIE, SMALL BUS. ASS’N, IMMIGRANT ENTREPRENEURS AND SMALL BUSINESS OWNERS, AND THEIR ACCESS TO FINANCIAL CAPITAL 17 (2012).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 21.

<sup>62</sup> Stephen Yale-Loehr, Carolyn S. Lee, Nicolai Hinrichsen & Lindsay Schoonmaker, *EB-5 Immigrant Investors*, ALLIANCE OF BUS. IMMIGR. LAW, [http://www.abil.com/articles/EB-5%20Immigrant%20Investors%20\(Yale-Loehr\).pdf](http://www.abil.com/articles/EB-5%20Immigrant%20Investors%20(Yale-Loehr).pdf) (last visited Mar. 30, 2013) (updated from an article published in IMMIGRATION & NATIONALITY LAW HANDBOOK 63 (2008–09 ed.)).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> STUART ANDERSON, NAT’L FOUND. FOR AM. POLICY, A NEW IMMIGRANT ENTREPRENEUR VISA AIMED AT JOB CREATION IN AMERICA 5 (2010).

include investors and their dependents (spouses and children), the number of principals who made actual investments is even lower.<sup>67</sup>

## 2. E-2 Visa

The E-2 visa—also known as the “treaty investor visa”—allows foreign nationals hailing from countries that have a treaty with the United States,<sup>68</sup> entry into the United States to invest in an enterprise or entrepreneurial undertaking.<sup>69</sup> The E-2 allows for temporary residence and is typically issued for up to two years initially, with an unlimited number of possible two-year extensions.<sup>70</sup> In order to qualify for an E-2 visa, an immigrant entrepreneur must meet a number of requirements. First, an immigrant entrepreneur must have “invested or [be] in the process of investing a substantial amount of capital in a bona fide enterprise in the U.S.”<sup>71</sup> Second, the immigrant entrepreneur must demonstrate more than 50% ownership in the intended business enterprise.<sup>72</sup> Third, the intended enterprise must be one that “has the present or future capacity to generate income that is not exclusively for the purpose”<sup>73</sup> of “provid[ing] a minimal living for supporting the treaty investor and his or her family.”<sup>74</sup>

While the E-2 visa has been much more successful than the EB-5,<sup>75</sup> the E-2 visa has shortcomings and limitations of its own. First, because the E-2 visa is only available to foreign nationals of countries with which the United States has a treaty, foreign nationals from countries absent from this list are excluded. As such, immigrant entrepreneurs from countries such as India—who play an important role in high-tech entrepreneurship in the United States<sup>76</sup>—cannot seek admission to the United States using an E-2 visa. Second, even though an immigrant entrepreneur with E-2 status can remain in the United States for as long as the business continues under the qualifying treaty ownership, the immigrant entrepreneur is not granted permanent residency.

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<sup>67</sup> *Id.* at 6–7.

<sup>68</sup> Tafapolsky, *supra* note 51, at 9 (a treaty of Friendship, Commerce and Navigation or a bilateral investment treaty).

<sup>69</sup> 8 U.S.C. § 1101(a)(15)(E) (2006).

<sup>70</sup> 8 C.F.R. § 214.2(e) (2012).

<sup>71</sup> 8 C.F.R. § 214.2(e)(2)(i).

<sup>72</sup> Tafapolsky, *supra* note 51, at 9.

<sup>73</sup> *Id.*

<sup>74</sup> 8 C.F.R. § 214.2(e)(15).

<sup>75</sup> David P. Weber, *Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success*, 23 GEO. IMMIGR. L.J. 765, 789 (2009).

<sup>76</sup> See WADHA ET AL., *supra* note 33, at 8 (“[I]ndians account for 33.2 percent of immigrant-founded engineering and technology companies started between 2006 and 2012.”); see also HART ET AL., *supra* note 42, at 6, 27.

## *B. Realizing the Potential of the World's Best and Brightest Students*

Every year, many of the world's best and brightest students come to the United States to pursue graduate studies.<sup>77</sup> In addition to the direct economic benefits immigrant students provide to the American economy,<sup>78</sup> foreign students in America's classrooms broaden the perspectives of their classmates, increase "patenting and science and engineering publishing,"<sup>79</sup> and generally enhance America's "scientific achievement and competitive position in the world economy."<sup>80</sup> However, while educators generally agree that foreign students benefit the United States immensely,<sup>81</sup> restrictive immigration policies inhibit America from fully realizing the entrepreneurial and innovative potential of foreign students in the United States.

This is concerning because American higher educational institutions "are uniquely positioned to educate students on principles of entrepreneurship and innovation . . . [P]rovide opportunities to translate this knowledge into scalable, sustainable, commercial ventures that create jobs and spur economic recovery and growth."<sup>82</sup> Furthermore, America has long-recognized the benefits of student innovators with entrepreneurial mindsets. Some of the most innovative and recognizable companies in America today—think Microsoft and Facebook—were founded by college students.<sup>83</sup> However, as will be discussed *infra*, our current immigration laws greatly restrict the ability of foreign student entrepreneurs to start new ventures and contribute to economic growth.

### *1. The F-1 Visa*

The majority of foreign students in the United States are here on temporary F-1 visas.<sup>84</sup> The F-1 visa allows immigrants to enter the United

<sup>77</sup> LEGOMSKY & RODRIGUEZ, *supra* note 48, at 394 ("[T]he foreign graduate students who come to the United States tend to be the cream of the crop of their countries.").

<sup>78</sup> *Id.* ("[F]oreign students now spend \$15.5 billion per year in the United States, mainly on tuition, room, board, and other expenditures.").

<sup>79</sup> Jennifer Hunt, *supra* note 41, at 420.

<sup>80</sup> LEGOMSKY & RODRIGUEZ, *supra* note 48, at 394.

<sup>81</sup> *Id.* at 393.

<sup>82</sup> ANTHONY LUPPINO ET AL., EWING MARION KAUFFMAN FOUND., REFORMING IMMIGRATION LAW TO ALLOW MORE FOREIGN STUDENT ENTREPRENEURS TO LAUNCH JOB-CREATING VENTURES IN THE UNITED STATES 6 (2012) [hereinafter FOREIGN STUDENT ENTREPRENEURS].

<sup>83</sup> *Id.* at 7.

<sup>84</sup> *Id.* at 10.

States temporarily for the sole purpose of furthering their education at an authorized academic institution.<sup>85</sup> In order to qualify for F-1 status, a foreign national must meet the following requirements: (1) have a residence in a foreign country and no intention to abandon that residence; (2) possess the qualifications to pursue a full course of study; (3) intend to depart the United States upon completion of the course of study; and (4) possess sufficient financial resources to pursue the course of study and cover living expenses.<sup>86</sup>

F-1 students are generally prohibited from working off-campus<sup>87</sup> and are permitted to work on-campus only as part of their educational programs for a limited number of hours per week.<sup>88</sup> After the completion of each higher education level, however,<sup>89</sup> foreign students may engage in Optional Practical Training (OPT)—“temporary employment . . . directly related to the student’s major area of study.”<sup>90</sup> Generally, the maximum OPT period is twelve months but it can be extended to twenty-nine months for foreign students whose degrees are in STEM fields.<sup>91</sup>

The stringent restrictions on the employment of foreign students are one of the main obstacles that potential foreign student entrepreneurs face. F-1 visa holders are prohibited “from being self-employed because self-employment is still considered ‘employment.’”<sup>92</sup> As a result, foreign students looking to remain in the United States to start a new business or launch an entrepreneurial venture cannot do so without jeopardizing their legal status.<sup>93</sup>

However, while foreign students are prohibited from being self-employed, they are not prohibited from investing in new companies or existing business ventures.<sup>94</sup> Generally, a foreign student cannot be “actively engage[d] in venture operations” but can be a “passive owner of a business.”<sup>95</sup> Nonetheless, this distinction between self-employment and

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<sup>85</sup> 8 U.S.C. § 1101(a)(F)(i) (2006).

<sup>86</sup> 8 C.F.R. § 214.2(f)(1)(i) (2012).

<sup>87</sup> LEGOMSKY & RODRIGUEZ, *supra* note 46, at 397 (generally, off-campus employment is allowed only after the first year, when unforeseen circumstances make employment economically necessary and USCIS grants permission).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (“[F]or example, once after a bachelor’s degree, again after a master’s degree, and yet again after a doctorate.”).

<sup>90</sup> 8 C.F.R. § 214.2(f)(10)(ii) (2012).

<sup>91</sup> 8 C.F.R. § 214.2(f)(10) (2012).

<sup>92</sup> FOREIGN STUDENT ENTREPRENEURS, *supra* note 81, at 11 (citing *Matter of Tong*, 16 I&N Dec. 593 (BIA 1978)).

<sup>93</sup> 8 U.S.C. § 1227(a)(1)(C)(i) (stating that unauthorized employment is a violation of F-1 visa status and may render a foreign student removable).

<sup>94</sup> FOREIGN STUDENT ENTREPRENEURS, *supra* note 82, at 11.

<sup>95</sup> *Id.* at 12.

investment is not very clear and the current state of the law provides little guidance.<sup>96</sup> Thus, even though there is a legally permissible way to gain some benefit from the potential of foreign student entrepreneurs, the lack of clarity regarding which activities could lead to a violation of visa status discourages this from occurring.

Furthermore, while OPT rules permit self-employment,<sup>97</sup> there are a number of practical limitations that render it ineffective for foreign student entrepreneurs that wish to remain and start a business in the United States. First, to be permissible under OPT, a business or entrepreneurial venture must be “related to the student’s degree program.”<sup>98</sup> However, entrepreneurship is “customarily interdisciplinary in its approach, and it may or may not be the case that a student’s startup is related to their principal field of study.”<sup>99</sup> This restriction not only limits the types of businesses and ventures foreign student entrepreneurs can start, it also necessarily involves “grey area determinations”<sup>100</sup> with regard to activities that could result in visa violations, and thus can discourage foreign student entrepreneurs from launching promising startups and business ventures. Second, even the maximum extended period permitted under OPT rules—twenty-nine months for foreign students whose degrees are in STEM fields—does not provide foreign students with a legally permissible way to stay in the United States long term to develop the startups or new businesses they may launch.

In addition to the stringent restrictions regarding employment, foreign student entrepreneurs face another obstacle. In order to maintain F-1 status, foreign students must have the intent to depart the United States upon completion of their studies. Starting a new business, however, is an indicator of the foreign student’s intent to remain in the United States on a long-term basis and can counter the presumption that the foreign student intends to depart the United States upon completion of the course of study.<sup>101</sup>

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<sup>96</sup> See *id.* at 11–13.

<sup>97</sup> *Id.* at 16.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> FOREIGN STUDENT ENTREPRENEURS, *supra* note 82, at 16.

<sup>101</sup> *Id.*

### *C. Capitalizing on the Entrepreneurial and Innovative Abilities of Highly Skilled Immigrants*

Immigrants play an important role in the American labor market today, as one in every six workers in the United States is foreign born.<sup>102</sup> With regard to the creation of startups and new businesses, however, highly skilled immigrant workers are of particular importance. Highly skilled immigrants are innovative and entrepreneurial—particularly in STEM fields and industries—and they possess a “striking propensity” to start and grow companies in these sectors.<sup>103</sup> Furthermore, the presence of these entrepreneurial and innovative immigrants in the American workforce contributes to the creation of startups and new businesses. Highly skilled immigrant workers are often able to recognize opportunities and innovative ideas that American-born entrepreneurs cannot; furthermore, immigrants may recognize “potential markets or supply chain relationships in their native lands” that may not be visible to their American-born counterparts.<sup>104</sup>

Despite the overwhelming evidence that the presence of highly skilled immigrants is an important contributor to the creation of startups and new businesses, restrictive immigration laws make it difficult for the United States to capitalize on the entrepreneurial and innovative abilities of highly skilled immigrant workers in two primary ways. First, it is increasingly difficult for startups and small businesses to attract and hire the foreign talent often necessary for these budding companies to develop and move forward. Second, it is difficult for highly skilled immigrants working in the United States to launch an entrepreneurial venture without jeopardizing their immigration status. Before discussing the pitfalls of our current immigration laws that have led to these two primary shortcomings, this note will provide a brief overview of the relevant U.S. immigration laws with regard to highly skilled immigrant workers.

#### *1. The H-1B Visa*

Highly skilled immigrants employed in the United States generally fall into two categories: those in the United States temporarily on an H-1B visa and those with permanent resident status as a result of an employment-based visa. While the focus of this section will be on highly skilled immigrants working in the United States temporarily on an H-1B visa,<sup>105</sup>

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<sup>102</sup> MADELINE ZAVODNY, AM. ENTER. INST. FOR PUB. POLICY RESEARCH & THE P'SHIP FOR A NEW AM. ECON., IMMIGRATION AND AMERICAN JOBS 6 (2011).

<sup>103</sup> See Schuck & Tyler, *supra* note 22, at 333; see also *supra* Part III.

<sup>104</sup> HART ET AL., *supra* note 42, at 22.

<sup>105</sup> As will be discussed *infra*, the H-1B visa is the primary source for highly skilled immigrant workers. Also, the danger of violating immigration status is not an obstacle to creating a startup or launching a new business for those highly skilled

knowledge of the employment-based visa program is important to fully understanding the shortcomings of the U.S. immigration system with regard to highly skilled immigrant workers.

The employment-based visa program consists of five preference categories that allow immigrants to become permanent residents of the United States. For purposes of this section, however, only the second (EB-2) and third (EB-3) preference categories are relevant.<sup>106</sup> The EB-2 visa is for members of the professions holding advanced degrees (or their equivalent) or those with exceptional ability in the sciences, arts or business.<sup>107</sup> The EB-3 visa is for skilled workers with at least two years training and members of the professions who hold baccalaureate degrees.<sup>108</sup>

U.S. immigration laws cap the total worldwide level of employment-based visas for all five of the preference categories at 140,000 per year.<sup>109</sup> There are further limits on the number of visas allotted to each of the preference categories. Specifically, the EB-2 and EB-3 visas are each allotted a maximum of 28.6% of the worldwide level of employment-based visas.<sup>110</sup> Finally, there are also limits on the number of visas available to immigrants from any given country—no more than 7% of the employment-based visas for all five of the preference categories may go to citizens from any one country annually.<sup>111</sup>

The quotas for the employment-based visas have proven inadequate and have resulted in a backlog and increasingly long waiting times. According to the National Foundation for American Policy, the “wait times for employment-based green cards sponsored today can last 5 years or even

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immigrant workers that are permanent residents as a result of an employment-based visa.

<sup>106</sup> The first preference category (EB-1) is not relevant here as it is for immigrants with extraordinary ability, outstanding professors and researchers and certain multinational executives and managers. *See* 8 U.S.C. § 1153(b)(1) (2006). The fourth preference category (EB-4) is also not relevant here as it is for certain special immigrants who largely consist of religious workers and certain foreign employees of the U.S. government. *See id.* § 1153(b)(4). Finally, the fifth preference category (EB-5) is also irrelevant here as it is for investors and job creation. *See id.* § 1153(b)(5); *see also supra* Part IV.

<sup>107</sup> 8 U.S.C. § 1153(b)(2).

<sup>108</sup> *Id.* § 1153(b)(3). The EB-3 is also available for certain unskilled workers in occupations in which there is a shortage of U.S. workers. *See id.*

§ 1153(b)(3)(A)(iii).

<sup>109</sup> *Id.* § 1151(d).

<sup>110</sup> *Id.* § 1153(b)(2)(A), (b)(3)(A).

<sup>111</sup> *Id.* § 1152(a)(3)(A).

decades, depending on the [applicant's] category and country of origin."<sup>112</sup> As a result of backlog and increasingly long waiting times, the EB-2 and EB-3 visas are no longer practical for U.S. employers that need to hire foreign talent.<sup>113</sup> As such, the H-1B visa has become the primary source for highly skilled immigrants in the U.S. workforce.<sup>114</sup>

The H-1B is a temporary work visa for occupations that require a "theoretical and practical application of a body of specialized knowledge" and the "attainment of a bachelor's degree or higher in the specific specialty."<sup>115</sup> The H-1B requires a sponsoring employer<sup>116</sup> and permits the holder to work in the United States for three years with the potential to renew one time for an additional three years.<sup>117</sup> The sponsoring employer must file a Labor Condition Application (LCA) with the Department of Labor and attest to several things, including (1) that it is paying the beneficiary at least the prevailing wage for the occupation in the area of employment or the actual wage level paid by the employer to all other individuals with similar experience and qualifications at the place of employment, whichever is greater; and (2) the working conditions of similarly employed workers will not be adversely affected by the hiring of the visa holder.<sup>118</sup> This note will next address the limitations of the H-1B visa that make it difficult for the United States to capitalize on the entrepreneurial and innovative abilities of highly skilled immigrant workers.

#### a. *Inadequate Quotas*

Similar to the employment-based visas, U.S. immigration laws cap on the number of H-1B visas issued annually. Currently, H-1B visas are capped at 65,000 for each fiscal year, with an additional 20,000 visas allotted for foreign students graduating from U.S. universities with a master's degree or higher.<sup>119</sup> Similar to the employment-based visas, the H-

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<sup>112</sup> NAT'L FOUND. FOR AM. POLICY, STILL WAITING: GREEN CARD PROBLEMS PERSIST FOR HIGH SKILL IMMIGRANTS 1 (2012) [hereinafter STILL WAITING]. For example, the analysis found projected wait times of eight years or more for Indians in the EB-2 category and up to seventy years for those in the EB-3 category. *Id.*

<sup>113</sup> See NAT'L FOUND. FOR AM. POLICY, H-1B VISAS BY THE NUMBERS: 2010 AND BEYOND 1 (2010) (stating that the current wait for employer-sponsored green cards—six to twenty years—is "a timeframe unrealistic for hiring new employees").

<sup>114</sup> See *id.* (stating that the availability of H-1B visas is crucial otherwise skilled foreign nationals could not work in the United States).

<sup>115</sup> 8 U.S.C. § 1184(i).

<sup>116</sup> *Id.* § 1182(n).

<sup>117</sup> *Id.* § 1184(g)(4); 8 C.F.R. § 214.2(h)(9)(iii)(A)(1) (2012).

<sup>118</sup> 8 U.S.C. § 1182(n).

<sup>119</sup> *Id.* § 1184(g)(1).



1B quotas have proved inadequate. The high demand for highly skilled immigrant workers and the low number of available H-1B visas available have resulted in the exhaustion of the quotas fairly quickly.<sup>120</sup> For the 2013 fiscal year, USCIS began accepting H-1B petitions on April 2, 2012.<sup>121</sup> On June 12, 2012—less than three months later—USCIS announced that it had reached the statutory cap for H-1B petitions and that any H-1B petitions for employment in fiscal year 2013 received after June 11, 2012 would be rejected.<sup>122</sup>

The insufficient number of H-1B visas available stifles the creation and growth of startups and small businesses. Entrepreneurs have cited the “difficulty of finding and attracting . . . highly skilled, entrepreneurial workers” as possibly the “most significant constraint” on both their growth and that of future entrepreneurs.<sup>123</sup> Furthermore, in a recent report released by the Small Business Administration, entrepreneurs specifically identified current U.S. immigration policy as one of the barriers inhibiting their ability to start and grow companies.<sup>124</sup> This comes at a dangerous time for the American economy. The expanding job growth in STEM fields<sup>125</sup> has

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<sup>120</sup> Schuck & Tyler, *supra* note 22, at 343 (“In each of the past seven years, and nine of the past eleven years, the allotment of H-1B visas has been exhausted before or shortly after the applicable fiscal year began. In each of the past three years, the quota was depleted before the fiscal year began.”).

<sup>121</sup> *USCIS to Accept H-1B Petitions for Fiscal Year 2012 Beginning April 2, 2012*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov> (last updated Mar. 27, 2012).

<sup>122</sup> *USCIS Reaches Fiscal Year 2013 H-1B Cap*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov> (last updated June 12, 2012).

<sup>123</sup> ROAD TO AN ENTREPRENEURIAL ECONOMY, *supra* note 14, at 2.

<sup>124</sup> U.S. SMALL BUS. ADMIN., STARTUP AMERICA: REDUCING BARRIERS 5 (2012), available at <http://www.sba.gov/sites/default/files/Startup%20America%20Reducing%20Barriers%20Report.pdf>. Startup America is a “White House and Interagency initiative to celebrate, inspire, and accelerate high growth entrepreneurship throughout the nation.” *Id.* at 1. Startup America aims to identify and reduce the most important obstacles facing entrepreneurs in America. *Id.* As part of Startup America, the Small Businesses Administration hosted a series of roundtable events in eight cities and heard firsthand from over 1000 entrepreneurs and investors regarding the barriers inhibiting their ability to start and grow companies, and their proposed solutions to these barriers. *Id.*

<sup>125</sup> U.S. DEP’T OF COMMERCE, STEM: GOOD JOBS NOW AND FOR THE FUTURE 1 (2011) (stating that the growth in STEM jobs over the past ten years has been three times as fast as growth in non-STEM jobs and that STEM jobs are projected to grow 17 % by 2018).

created a demand for engineers, scientists and other skilled professionals that cannot be filled by American workers alone.<sup>126</sup>

While the inadequate quotas create a difficulty for all companies that seek to employ highly skilled immigrants, the shortage of H-1B visas is especially detrimental to startups and small businesses. First, hiring the right person is critical for startups and new businesses: “When in the emerging growth phase you have to get the best person.”<sup>127</sup> Second, while larger companies often are able to outsource functions and place personnel abroad in an effort to cope with the inadequate quotas and the resulting difficulty in bringing over key foreign hires, small businesses generally do not possess this option.<sup>128</sup>

### b. *Lack of Fit*

USCIS’s lack of familiarity and understanding with regard to the organizational structure of startups and small businesses and the way they operate further stifles the creation and growth of these important entrepreneurial ventures.<sup>129</sup> USCIS’s “heavy-handed approach” to startups and small businesses during the adjudication process has made it

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<sup>126</sup> INFO. TECH. INDUS. COUNCIL ET AL., HELP WANTED: THE ROLE OF FOREIGN WORKERS IN THE INNOVATION ECONOMY 1 (2012) (“[B]y 2018 there will be more than 230,000 advanced degree STEM jobs that will not be filled even if every single new American STEM grad finds a job.”).

<sup>127</sup> STUART ANDERSON, NAT’L FOUND. FOR AM. POLICY, IMMIGRANT FOUNDERS AND KEY PERSONNEL IN AMERICA’S 50 TOP VENTURE-FUNDED COMPANIES 2 (2011) (quoting Eric Lekacz, co-founder of a company that provides network infrastructure for wireless providers); *see also* Janis Reyes, *Immigrant Entrepreneurs Ask Government To Get in Step With Cutting-Edge Startups*, 31 No. 4, THE SMALL BUSINESS ADVOCATE 4 (2012) (stating that entrepreneurs rely on a functioning immigration system and that this is especially critical in the startup phase because founders, employees and funding sources need to be in close proximity).

<sup>128</sup> ANDERSON & PLATZER, *supra* note 43, at 24.

<sup>129</sup> Malcom Goeschl, *An Attack on Entrepreneurialism: A Review of USCIS Adjudication of H-1B Petitions for Startups and Small Companies in 2009*, 22 INT’L Q. 16 (2010); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., ENTREPRENEURS IN RESIDENCE INFORMATION SUMMIT (2012), [hereinafter ENTREPRENEURS IN RESIDENCE SUMMARY]. At the USCIS Entrepreneurs in Residence Information Summit, USCIS acknowledged that it is less familiar with the organizational structure of startups and small businesses than that of traditional large businesses. *Id.* at 2. The USCIS Entrepreneurs in Residence Information Summit was hosted by USCIS Director Alejandro Mayorkas to launch the USCIS Entrepreneurs in Residence Initiative (EIR) and to inform the work of the EIR team, which aims to ensure that the immigration pathways for foreign entrepreneurs are clear and consistent, and better reflective of today’s business realities. *Id.* at 1.

increasingly difficult for these companies to hire highly skilled immigrant workers through H-1B sponsorship.<sup>130</sup> First, there has been concern raised with regard to the overly burdensome and often unrealistic Requests For Evidence (RFEs) that startups and small businesses are facing from USCIS.<sup>131</sup> USCIS RFEs for startups and small business are increasingly requiring that petitioners submit documents such as tax returns, quarterly wage statements, promotional materials and lease agreements—documents that many small businesses and startups often do not have.<sup>132</sup> As one commentator noted, the fact that USCIS asks for these documents “suggests that the USCIS officers who have drafted the laundry list either have little understanding of how startups and small businesses operate or they have surreptitiously established their own ‘minimum size’ standard for H-1B petitioners.”<sup>133</sup>

Second, the LCA requirement that an employer pay the H-1B beneficiary at least the “prevailing wage level for the occupational classification in the area of intended employment”<sup>134</sup> discriminates against startups and small businesses.<sup>135</sup> The LCA wage level requirement does not take into consideration the size of businesses<sup>136</sup> or that startup companies often have limited resources and tight budgets in the beginning phases. Furthermore, the “no benching” rule,<sup>137</sup> which requires that employers pay H-1Bs at least the prevailing wage, regardless of whether the employee is

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<sup>130</sup> Goeschl, *supra* note 129, at 2.

<sup>131</sup> See ENTREPRENEURS IN RESIDENCE SUMMARY, *supra* note 129, at 2; Goeschl, *supra* note 129, at 3.

<sup>132</sup> Goeschl, *supra* note 128, at 3. For many startups, which are often established during the current tax year of the H-1B petition, it is impossible to provide tax returns as annual corporate taxes are not filed until the next calendar year. *Id.* Likewise, payroll records often do not exist in the case of startups and new businesses as the individuals employed during these early phases are often working only for equity and the anticipation of future profitability. *Id.* at 4. Additionally, many small startup companies in the developmental stage operate in “stealth mode”—they do not publicize their technology or products to avoid the technology being appropriated—and thus, do not have promotional materials. *Id.* at 5. Finally, many startups cannot provide lease agreements as these companies often operate in informal places—a living room or coffee shop—or will use an investor’s office space. *Id.* at 5.

<sup>133</sup> *Id.* at 6.

<sup>134</sup> 20 C.F.R. § 655.731(a) (2012).

<sup>135</sup> See Tafapolsky, *supra* note 51, at 5.

<sup>136</sup> *Id.*

<sup>137</sup> As referred to by Alan Tafapolsky. See *id.*

providing productive employment or not.<sup>138</sup> The rule further squeezes the resources of startups and small business, and is not in line with the “start and stop nature” of early businesses.<sup>139</sup>

Third, even though all petitions for H-1B visas require a showing that the beneficiary is coming to the United States for temporary employment in a “specialty occupation,”<sup>140</sup> USCIS has been “increasingly restrictive” in its application of the “specialty occupation test” to startups and small businesses.<sup>141</sup> As one commentator noted, in all of the decisions made by the Administrative Appeals Office (AAO) for the January 2009 to September 2009 period, only one small petitioner has been able to meet AAO’s criteria with regard to specialty occupations.<sup>142</sup> Furthermore, even though all petitioning employers “bear the burden of proof” in establishing that a particular position qualifies as a “specialty occupation,”<sup>143</sup> USCIS has “elevated the bar” for proof when dealing with startups and small businesses.<sup>144</sup> According to immigration practitioners who have represented companies of all sizes, it seems that “the smaller the company, the heavier the burden.”<sup>145</sup>

USCIS’s “overreliance” on the Department of Labor’s Occupational Outlook Handbook (OOH) in determining whether a particular position qualifies as a specialty occupation is also problematic as there is concern that the OOH guidelines are not on “track [with] the current trends in today’s occupations and positions.”<sup>146</sup> Furthermore, the OOH “rarely states that any occupation normally requires a bachelor’s degree in a specific field,” and as such, many of the examples of specialty occupations listed in the regulations “would not meet the AAO’s restrictive reading of the OOH when applied to small employers.”<sup>147</sup> Finally, USCIS’s characterization of a “specialty occupation” is not in line with the reality of startups and new businesses. Even though employees often hold multiple roles and perform a variety of duties during a company’s early stages, the

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<sup>138</sup> 20 C.F.R. § 655.731(c)(7)(i) (requiring an employer to continue to pay a H-1B employee even if the employee is “not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work).”).

<sup>139</sup> Tafapolsky, *supra* note 51, at 5.

<sup>140</sup> 8 U.S.C. § 1101(15)(h) (2006).

<sup>141</sup> Goeschl, *supra* note 129, at 7. For a discussion of “specialty occupation,” see 8 C.F.R. § 214.2(h)(4)(iii)(A).

<sup>142</sup> See Goeschl, *supra* note 129, at 7.

<sup>143</sup> *Id.* at 10.

<sup>144</sup> *Id.* at 6.

<sup>145</sup> *Id.* at 10.

<sup>146</sup> ENTREPRENEURS IN RESIDENCE SUMMARY, *supra* note 129.

<sup>147</sup> Goeschl, *supra* note 129, at 7 & n.48.

“scientist/businessman hybrid or the multi-hat wearer so often found in many of America’s high-tech startups” is not recognized.<sup>148</sup>

*c. Employee-Owner Conundrum*

Finally, USCIS’s reluctance to extend the H-1B visa to employee-owners of startup companies further inhibits immigrant entrepreneurship and stifles the creation of startups and small businesses. The H-1B regulations require, among other things, that a sponsoring employer have “an employer-employee relationship with respect to [the H-1B beneficiary employee] as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.”<sup>149</sup> Typically, employers will petition USCIS on behalf of their H-1B beneficiaries and will establish that all the requirements for the H-1B visa are satisfied, including the existence of a valid employer-employee relationship. With regard to H-1B beneficiaries that are self-employed or have significant ownership interests in a sponsoring entity, however, USCIS’s “guidance” as to what constitutes a valid employer-employee relationship is problematic.

On January 8, 2010, USCIS issued a memorandum (Neufeld Memo) intended to provide guidance to adjudication officers on what constitutes a valid employer-employee relationship in the context of H-1B petitions for self-employed beneficiaries, beneficiaries placed at third-party worksites and independent contractors.<sup>150</sup> In the Neufeld Memo, petitions by self-employed beneficiaries are listed under “scenarios [that] would not present a valid employer-employee relationship.”<sup>151</sup> Accordingly, it is very difficult for petitioners who are self-employed or have significant ownership interests in a sponsoring entity to demonstrate a valid employer-employee relationship because, based on the Neufeld Memo, USCIS considers there to be no distinction between the individual and the employing entity in these instances.

Unsurprisingly, the Neufeld Memo has been a cause for concern. Both “industry and immigration advocates” have criticized the Neufeld Memo, pointing out that it will discourage immigrant entrepreneurs from investing capital and launching new ventures in the United States.<sup>152</sup> Additionally, in

<sup>148</sup> Tafapolsky, *supra* note 51, at 5.

<sup>149</sup> 8 C.F.R. 214.2(h)(4)(ii) (2012).

<sup>150</sup> Memorandum from Donald Neufeld, Exec. Dir., U.S. Citizenship & Immigration Servs., to Lori Scialabba, Assoc. Dir., Refugee, Asylum & Int’l Operations Directorate & Pearl Chang, Acting Chief, Office of Politics & Strategy, U.S. Citizenship & Immigration Servs. (Jan. 8, 2010) [hereinafter Neufeld Memo].

<sup>151</sup> *Id.* at 5.

<sup>152</sup> AUSTIN T. FRAGOMEN, JR. ET AL., H-1B HANDBOOK § 1:42.2 (2012).

a letter addressed to USCIS's chief counsel, the American Immigration Lawyer's Association "urge[d] USCIS to immediately rescind the Neufeld Memorandum."<sup>153</sup> Furthermore, in 2010, the Neufeld Memo guidelines pertaining to what constitutes an employer-employee relationship were challenged in court, albeit unsuccessfully, by a group of consulting and staffing firms operating in the information technology and healthcare industries.<sup>154</sup>

The concerns and criticisms generated by the Neufeld Memo did not go unnoticed by USCIS. On January 13, 2010, August 2, 2011, and March 12, 2012, USCIS issued "updated guidance" as to what constitutes a valid employer-employee relationship in the H-1B context.<sup>155</sup> According to the revised guidance, if a self-petitioner provides evidence of a "separate Board of Directors which has the ability to hire, fire, pay, supervise or otherwise control the beneficiary's employment," the self-petitioner may be able to establish that a valid employer-employee relationship exists.<sup>156</sup> According to some practitioners, however, the updated guidelines are unlikely to change the high rate of denials for cases involving employer-owners.<sup>157</sup>

## V. POTENTIAL SOLUTIONS

### A. *Creating a Genuine Immigrant Entrepreneur Visa*

The creation of a genuine immigrant entrepreneur visa is perhaps the most important step toward addressing the shortcomings of our immigration policies that stifle the creation and growth of startups and small businesses. Despite overwhelming evidence of the economic benefits immigrant entrepreneurs provide to the American economy, there is currently no visa category specifically designed for immigrant entrepreneurs. As discussed in Part IV, the visa categories originally intended to attract foreign entrepreneurship and investment suffer from shortcomings and limitations that do not remove the obstacles that immigrant entrepreneurs face. Accordingly, this note recommends that any legislation creating an entrepreneur visa should incorporate the following three features: (1) reasonable capital requirements; (2) a path to permanent residency; and (3) a shift in focus toward the entrepreneurial and innovative immigrants already present in the United States.<sup>158</sup>

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<sup>153</sup> Letter from American Immigration Lawyers Association to Roxana Bacon, Chief Counsel, U.S. Citizenship & Immigration Servs. (Jan. 26, 2010).

<sup>154</sup> FRAGOMEN, JR., *supra* note 152.

<sup>155</sup> *Id.*; Neufeld Memo, *supra* note 150.

<sup>156</sup> Neufeld Memo, *supra* note 150.

<sup>157</sup> FRAGOMEN, JR., *supra* note 152.

<sup>158</sup> This note does not seek to propose specifically how an entrepreneur visa should be structured or the criteria necessary for eligibility. Rather, this note aims at

## 1. Reasonable Capital Requirements

The large amounts of capital required for the EB-5 are not in accord with the realities of startups or immigrant entrepreneurs. Less than 2% of all new businesses start with \$1,000,000 or more in startup capital.<sup>159</sup> Additionally, more than half of all immigrant entrepreneurs launch their businesses “with less than \$5,000 in startup capital.”<sup>160</sup> Furthermore, high capital requirements contribute to one of the greatest barriers preventing nascent entrepreneurs from starting companies: “inadequate access to financial capital.”<sup>161</sup> High capital requirements such as that of the EB-5 visa require that immigrant entrepreneurs seek venture capital investment or other alternate sources of financial capital. It is highly unlikely that immigrant entrepreneurs are able to rely on personal and family savings<sup>162</sup> to meet these high capital thresholds.

Obtaining venture capital investment is no easy task. Less than 1% of companies started each year receive venture capital funding.<sup>163</sup> Moreover, for many foreign entrepreneurs who are outside the United States and lack the network and contacts to access venture capital investment, the chances are even slimmer.<sup>164</sup> This note does not propose any specific capital requirements for an entrepreneur visa. Rather, this note argues that in order to create an effective entrepreneur visa, policymakers must keep in mind the realities of today’s startups and immigrant entrepreneurs.

## 2. A Path to Permanent Residency

An entrepreneur visa that does not provide immigrant entrepreneurs with a path to permanent residency fails to address a critical shortcoming of the current U.S. immigration policies with regard to immigrant

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highlighting the three general features that an entrepreneur visa should incorporate in order to best serve its purpose.

<sup>159</sup> FAIRLIE, *supra* note 59, at 17.

<sup>160</sup> *See id.* at 16 (stating that 51.7% of immigrant firms start with less than \$5000 in startup capital). In fact, 72.9% of immigrant firms start with less than \$25,000 in startup capital. *Id.* at 17.

<sup>161</sup> *Id.* at 14.

<sup>162</sup> Personal and family savings are the most common source of startup capital for immigrant entrepreneurs. FAIRLIE, *supra* note 59, at 21.

<sup>163</sup> Schuck & Tyler, *supra* note 22, at 356.

<sup>164</sup> *See id.* The fact that the proposed Start Up Visa Act of 2010 requires that immigrants meet certain capital-raising thresholds from qualified venture capitalists assumes “the existence of a network that includes citizens who are, or have access to, venture capitalists or super angels even before the person arrives in the United States.” *Id.* “[T]his assumption further restricts the eligible applicant pool.” *Id.*

entrepreneurs. The lack of certainty with regard to permanent resident status is a factor that prevents many potential immigrant entrepreneurs from taking the “leap” and starting their own companies in America.<sup>165</sup> A recent study of high-growth Indian American immigrant entrepreneurs found that the “lengthy process to obtain permanent residency delay[s] the start of the entrepreneurial journey.”<sup>166</sup> All of the entrepreneurs in the study waited until they obtained permanent resident status before launching their entrepreneurial ventures.<sup>167</sup> Finally, an entrepreneur visa that does not provide permanent resident status may “limit entrepreneurial activity by visa-holders” as the “temporary status creates uncertainty for possible capital sources.”<sup>168</sup>

### 3. *A Shift in Focus*

The conversation regarding the creation of an entrepreneur visa has been largely focused on attracting entrepreneurs outside America. This note argues that a shift in focus toward the entrepreneurial and innovative immigrants already present in the United States is perhaps a wiser approach. First, the pool of eligible applicants for an entrepreneur visa should be expanded to include highly skilled immigrants employed in the United States temporarily on H-1B visas.

Highly skilled immigrants working in the United States are far better positioned to recognize entrepreneurial opportunity than entrepreneurs outside America. It is well established that work experience plays a crucial role in the recognition of entrepreneurial opportunity and the generation of new business ideas.<sup>169</sup> In fact, a recent study of high-growth Indian American immigrant entrepreneurs found that for all of the entrepreneurs in the study, their work experience in the United States prior to the launch of their entrepreneurial ventures “played the most significant role” in their recognition of entrepreneurial opportunity.<sup>170</sup> The entrepreneurs also reported that their work experience in America provided “valuable insights

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<sup>165</sup> See HART ET AL., *supra* note 42, at 55.

<sup>166</sup> Suresh Kumar & Norris F. Krueger, Making the United States Immigration Policy and the Startup Visa Act Proposal Effective: An Exploratory Study of High-Growth Indian American Immigrant Entrepreneurs 11 (June 15, 2012) (unpublished research paper), available at <http://ssrn.com/abstract=2096426>

<sup>167</sup> *Id.*

<sup>168</sup> Schuck & Tyler, *supra* note 22, at 356.

<sup>169</sup> Jonas Gabrielsson & Diamanto Politis, *Work Experience and the Generation of New Business Ideas Among Entrepreneurs*, 18 INT’L J. ENTREPRENEURIAL BEHAV. & RES., 48, 48–49 (2012) (“There is little disagreement among entrepreneurship scholars that the accumulated work experience that enterprising individuals gain during their course of life is an important source for the generation of new business ideas.” (citations omitted)).

<sup>170</sup> Kumar & Krueger, *supra* note 166.



about problems and potential opportunities related to their clients and industry,” and for a majority of the entrepreneurs, these insights were the “foundational ideas for their entrepreneurial ventures.”<sup>171</sup>

Furthermore, highly skilled immigrants working in the United States are also likely to be in a better position to capitalize on entrepreneurial opportunities. The exploitation of entrepreneurial opportunities often requires that entrepreneurs draw on the “money, talent, contacts and knowledge” of their colleagues and society generally.<sup>172</sup> Furthermore, the ability of entrepreneurs to access these resources at a reasonable cost and in a timely manner depends on the networks that entrepreneurs are embedded in, “and the levels of trust that exist in [those] networks.”<sup>173</sup> Immigrants working in the United States are more able to tap into the ethnic social and professional networks that exist in America today. In fact, successful high-growth immigrant entrepreneurs who worked in the United States prior to launching their entrepreneurial ventures have cited “ethnic professional network” ties in the United States and relationships with U.S. coworkers as factors critical to their success.<sup>174</sup> Entrepreneurs outside America likely lack the benefits of both of these factors; as such, they are at a disadvantage in comparison to prospective immigrant entrepreneurs who are already in the United States.

Second, successful immigrant entrepreneurs who originally entered the United States without inspection or overstayed a visa should also be eligible to qualify for entrepreneur visas.<sup>175</sup> It would make little sense if these immigrant entrepreneurs who have already demonstrated the ability to create productive businesses in America were not eligible for a visa designed to attract individuals capable of doing just that.<sup>176</sup> Additionally, a path to permanent residency will not only allow these successful immigrant entrepreneurs to expand their existing productive businesses, but will also promote new business creation.<sup>177</sup>

Finally, immigrant entrepreneurs who are selected to participate in prestigious U.S. startup incubator programs should also be eligible for entrepreneur visas. The United States contains some of the premier business

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<sup>171</sup> *Id.* at 7.

<sup>172</sup> HART ET AL., *supra* note 42, at 24.

<sup>173</sup> *Id.*

<sup>174</sup> Kumar & Krueger, *supra* note 166, at 14.

<sup>175</sup> See generally Weber, *supra* note 75 (proposing that “the creation of a new class of entrepreneurial visas that is specifically targeted at those successful immigrant entrepreneurs who have entered without inspection or who have overstayed a visa.”).

<sup>176</sup> *Id.* at 812.

<sup>177</sup> *Id.*

incubators in the world.<sup>178</sup> Y Combinator, the top incubator on Forbes recent rankings of the top U.S. incubators, has a “total value of \$7.78 billion, for an average of \$45.2 million per company.”<sup>179</sup> Furthermore, the top-flight incubators are highly selective and only the most promising entrepreneurial ventures are elected to participate. Techstars, which came in second in recent rankings by Forbes of the top U.S. incubators, accepts only one percent of the 4000 applications received each year.<sup>180</sup> For many immigrant entrepreneurs, however, the chances are even slimmer. According to TechStars co-founder David Cohen, “foreign applicants ‘on the bubble’ of gaining acceptance are sometimes turned away” because incubators know the chances are slim that the foreign applicants will be able to legally remain in America.<sup>181</sup> Accordingly, any proposal for an entrepreneur visa should make use of America’s elite business incubators.

## B. *Additional Solutions*

While the creation of a genuine immigrant entrepreneur visa is essential to addressing the shortcomings of our immigration laws that stifle the creation of startups and small businesses, more reforms are needed. In addition to the creation of a visa category for immigrant entrepreneurs, the following three solutions must be part of a more comprehensive strategy: (1) eliminating the backlog in the employment-based visa program; (2) fixing the H-1B visa; and (3) providing permanent resident status to foreign students who graduate from an American university with an advanced STEM degree, and have a STEM-related job offer from an American employer.

### 1. *Eliminating Backlog in the Employment-Based Visa Program*

Reforming the employment-based visa program is a critical element of any comprehensive strategy that aims to address the shortcomings of the current immigration laws that stifle immigrant entrepreneurship. First,

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<sup>178</sup> ALEXANDRA STARR, COUNCIL ON FOREIGN RELATIONS, *LATINO IMMIGRANT ENTREPRENEURS: HOW TO CAPITALIZE ON THEIR ECONOMIC POTENTIAL* 13 (2012) (“The most prestigious incubator programs, like Y Combinator and TechStars, have become a credential analogous to an MBA from Stanford or Harvard.”).

<sup>179</sup> Ryan Mac, *Top Startup Incubators and Accelerators: Y Combinator Tops with \$7.8 Billion in Value*, FORBES, Apr. 30, 2012, <http://www.forbes.com/sites/tomiogeron/2012/04/30/top-tech-incubators-as-ranked-by-forbes-y-combinator-tops-with-7-billion-in-value/> (“[T]ak[ing] into account the 172 companies that have been acquired, shut down or raised funding.”).

<sup>180</sup> *Id.*

<sup>181</sup> Alexandra Starr, *Incubating Ideas in the U.S., Hatching Them Elsewhere*, WALL ST. J., Sept. 11, 2012, <http://online.wsj.com/article/SB10000872396390443759504577631651529404854.html>.

Congress should increase the annual cap on employment-based visas, and in particular, the quotas for the EB-2 and EB-3 visa categories. The current annual limit of 140,000 employment-based visas was set by Congress in 1990 and is not in line with America's current economic needs. According to the National Foundation for American Policy, the U.S. GDP has nearly tripled since 1990 but the annual quota for employment-based visas has remained the same.<sup>182</sup>

• Second, an increase in the employment-based visa quotas should be accompanied by a decrease in the quotas for family-based visas.<sup>183</sup> The current U.S. immigration system is primarily family-based: only about 7% of the permanent resident visas awarded annually are employment-based.<sup>184</sup> In contrast, 25% of the permanent resident visas awarded in Canada every year are based on employment; in Australia, it is as high as 42%.<sup>185</sup> Furthermore, in comparison to other countries, the United States not only allocates a far lower percentage of permanent resident visas based on employment needs, but it also has "one of the lowest rates of economic-based immigration in the world."<sup>186</sup> Accordingly, a shift toward an immigration system that prioritizes economic goals and awards a greater percentage of permanent resident visas based on employment needs will go a long way toward eliminating backlog in the current employment-based visa program and addressing the current pitfalls that most hurt immigrant entrepreneurship.

Finally, the per-country limit should be eliminated or adjusted to reflect the number of employment-based visa applicants each country generates in the prior fiscal year. According to a 2011 analysis by the National Foundation for American Policy, eliminating the per-country limits would likely reduce the EB-2 waiting times for all applicants to approximately two to three years and reduce the EB-3 wait times for applicants from heavy subscription countries such as India from seventy years to twelve.<sup>187</sup> On the other hand, adjusting the per-country limits will allow for a more efficient quota system that increases the number of employment-based visas

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<sup>182</sup> STILL WAITING, *supra* note 112, at 2 ("The Gross Domestic Product (GDP) of the United States has nearly tripled (in nominal dollars) since 1990, from \$5.8 trillion to over \$15 trillion in 2012, but the employment-based immigrant visa category has remained at 140,000 visas annually.").

<sup>183</sup> GIOVANNI PERI, THE HAMILTON PROJECT, RATIONALIZING U.S. IMMIGRATION POLICY: REFORMS FOR SIMPLICITY, FAIRNESS, AND ECONOMIC GROWTH 13 (2012) (proposing a rebalancing between the family-based and labor-based visas in favor of employment-based visas).

<sup>184</sup> NOT COMING TO AMERICA, *supra* note 52, at 34.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> STILL WAITING, *supra* note 112, at 10.

available for countries with high levels of applicants and decreases the quotas for those countries with low levels of demand.<sup>188</sup>

## 2. *Fixing the H-1B Visa*

The limitations of the H-1B visa also must be addressed in order to effectively resolve the pitfalls of our current immigration policies. First, Congress should increase the annual quota for H-1B visas, or alternatively, eliminate the cap completely. Similar to the employment-based visas, the current annual cap of 65,000 H-1B visas is approximately the same as the level available in 1990 despite the fact that the U.S. GDP has nearly tripled since 1990.<sup>189</sup> Moreover, one of the primary shortcomings of the U.S. immigration system is the lack of connection between the current market conditions and the number of H-1B visas available. Eliminating the cap completely will allow U.S. employers and the American economy to set H-1B quotas based on the level of demand for skilled labor, rather than the cap arbitrarily set by Congress. Finally, USCIS should allow self-employed beneficiaries to sponsor themselves and should provide training to its officials that adjudicate H-1B petitions so that they may better understand the organizational and operational realities of startups and small businesses.

## 3. *Providing Permanent Resident Status to Foreign Students*

As the final element of a comprehensive strategy, this note proposes providing a permanent resident visa to foreign students who graduate from an American university with an advanced STEM degree and have a job offer from an American employer in a STEM-related field. President Barack Obama has recognized the importance of retaining these entrepreneurial and innovative students and has proposed “stapling a green card to the diplomas” of foreign students who graduate with a STEM degree from an American university.<sup>190</sup> Furthermore, STEM graduates who gain permanent residence and enter the American workforce as a result of this proposed solution should not be considered in the calculation of the annual quotas for permanent resident employment-based visas. This will avoid the current inefficiencies of the employment-based visa program and

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<sup>188</sup> See Ajay Malshe, *From Obsolete to Essential: How Reforming Our Immigration Laws Can Stimulate and Strengthen the United States Economy*, 3 ALB. GOV'T L. REV. 358, 367 (2010) (stating that even though the majority of individuals seeking admission come from just a handful of countries, only about 9800 employment-based immigrants from the same country may become permanent residents each year because of the 7% per-country limit).

<sup>189</sup> See STILL WAITING, *supra* note 112, at 2 (stating that the GDP of the United States has nearly tripled since 1990, from \$5.8 trillion to over \$15 trillion in 2012).

<sup>190</sup> THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM 25 (2011).

will contribute toward eliminating the program's backlog in the near future.<sup>191</sup>

## VI. CONCLUSION

The immigrant entrepreneurial spirit has always been a key to America's economic success. As the world becomes more globalized, the competition for entrepreneurial talent is more intense than ever. While America remains the most dynamic market in the world and the top destination for entrepreneurs, other countries are catching up. As restrictive immigration policies make it increasingly difficult for immigrant entrepreneurs to enter and remain in America, other countries are reforming their immigration policies to attract the entrepreneurial and innovative immigrants the United States is turning away. Finally, as new business creation by native-born entrepreneurs decreases, restrictive immigration policies also prevent the United States from capitalizing on the entrepreneurial talents of immigrant entrepreneurs who start new businesses, create jobs and drive economic growth.

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<sup>191</sup> See STILL WAITING, *supra* note 112, at 10 (stating an exemption of 50,000 STEM degree graduates would potentially eliminate the backlog for the EB-2 within three years and for the EB-3 within ten years).

